

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Zaine Basir Z-125 34 1384

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2255

Zaine Basir

This appeal has been taken in accordance with Title 46 United States Code 239(g) and 46 CFR 5.30-1.

By order dated October 10, 1979, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for 2 months, plus 4 months on 12 months' probation, upon finding him guilty of misconduct. The specifications found proved allege that while serving as Able Seaman on board SS DELTA BOLIVIA under authority of the document above captioned, on or about 2 December 1978, Appellant failed to perform his duties because of intoxication; failed to obey direct orders of the Third Mate and of the Chief Mate; wrongfully consumed alcoholic beverages aboard DELTA BOLIVIA, and used foul and abusive language toward the Third Mate.

The hearing was held on 15 February, 3 and 5 April, 11, 14, and 29 May, and 11 and 28 June 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specifications.

The Investigating Officer submitted three exhibits and the sworn testimony of four witnesses.

In defense, Appellant submitted eight exhibits and his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and all specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of 2 months plus 4 months on 12 months' probation.

The entire decision was served on 18 October 1979. Appeal was timely filed on 7 November 1979 and perfected on 22 May 1980.

FINDINGS OF FACT

On 2 December 1978, Appellant was serving as Able Seaman on board SS DELTA BOLIVIA under the authority of his document while the vessel was shifting berths in the port of Cartagena, Colombia.

The previous evening Appellant had gone ashore on authorized leave after having been informed by the Chief Officer, Demetrios I. Zervopoulous, that the vessel was scheduled to shift berths at about 0500, 2 December 1978. While he was ashore, Appellant visited two clubs in the company of other members in the crew. While he was visiting the clubs he consumed various intoxicating beverages including beer and rum. At about 0300 the Appellant returned to the vessel alone. At approximately 0430 on 2 December 1978, Appellant and several other crew members, including John Dix, the deck cadet, were in the crew mess sharing a one half gallon bottle of scotch. Each poured his own drinks, mixing the scotch with water. Appellant had at least three drinks and others had varying amounts. Ultimately, Appellant became intoxicated; he staggered and uttered loud obscenities, and his speech was slurred. Dix and Appellant remained in the mess room for over an hour.

The vessel did not shift according to the previous schedule, but finally did commence the shift at about 0720, to pier No. 2 Cartagena. The after docking station on the stern was manned by David McLean, the Third Mate, Randolph A. Archer, Able Seaman, Jose Violango, Able Seaman, Appellant and another seaman. When Appellant reported to the stern before the actual shift took place he was carrying a pitcher of ice water and a partially filled bottle of whiskey. The Third Mate and Appellant engaged in a conversation which was not overheard by the others and during the undocking they started shouting at each other. At this point, Appellant called McLean a foul name beginning with the word "mother". McLean then ordered Appellant to leave the deck and go to his room. Appellant walked forward but didn't go to his room and instead returned to the stern.

At the return of Appellant, Mr. McLean called the Chief Officer via walkie-talkie and reported what had occurred. The Chief Officer proceeded to the stern. Appellant smelled of alcohol, his speech was slurred, his eyes were glassy, and he was intoxicated. The Chief Officer ordered Appellant to his room. However, Appellant refused and insisted that he was able to do his work, and at the same time complained that the Third Mate had struck him. The Chief Officer inquired of those present what had happened. The Third Mate denied the accusation and the other two, Archer and Violango, said nothing. Appellant continued to refuse to leave, so the Chief Officer left the stern and proceeded to his room to obtain handcuffs.

Upon his return to the stern, the Chief Officer ordered Archer

and Violango to remove Appellant. As the two moved toward him, Appellant said that he was going and the Chief Officer accompanied Appellant. En route Appellant inquired whether he could get a cup of coffee in the mess room. The Chief Officer allowed Appellant to stay in the messroom but told him not to return to the stern. As Appellant entered the mess room the Chief Officer returned to the bridge.

Shortly thereafter, the Chief Officer received a walkie-talkie call reporting that the Appellant was back on the stern. As the Chief Officer reached the stern Appellant and McLean were cursing at each other. McLean called Appellant a "drunk" and Appellant called McLean the same two-word, foul name previously stated, and further said that McLean was "no good". The Chief Officer then accompanied Appellant from the stern to his room and ordered him to remain therein.

After leaving Appellant in his room, the Chief Officer made a report to the Master who then decided to conduct a search of Appellant's room. At about 0845 while the Master and the Chief Officer were outside Appellants room, McLean reported on the walkie-talkie that the Appellant was in his (McLean's) room. The Chief Officer went to the room of Mr. McLean and found McLean leaning against his bunk and Appellant leaning against the door frame. Appellant complained to the Chief Officer that Mr. McLean had struck him, but the Chief Officer observed no marks on Appellant nor any indication that a fight had occurred in the room occupied by McLean.

The Chief Officer and the Appellant then returned to the vicinity of Appellant's room, at which time the Master ordered a search. The search failed to turn up any alcoholic beverages. Later that morning the Appellant complained to the Chief Officer of body pains and a missing cap on a tooth. The Chief Officer referred Appellant to the purser/pharmacist's mate and Appellant subsequently was referred to a hospital ashore. At the time of the complaint and referral Appellant's speech was slurred and rambling, he was unsteady in movement, and there was an odor of alcohol on his breath

At 1245 the same day Appellant left the ship for a medical examination. Appellant returned to the vessel later the same afternoon in a not fit for duty status and subsequently departed the vessel at 1440 on 2 December 1978. Appellant was impatient at the Clinica DeManga S.A., Cartagena, Colombia, from 2 December 1978.

After returning to the United States, Appellant was examined on four separate occasions at the USPHS Outpatient Clinic in New

York. He was not found fit for duty because of a cracked tooth and a back contusion. On 29 December 1978, he was still found not fit and on 19 January 1979 he was found not fit. Although his back pain was resolved he required further dental work, and on 12 January 1979 was found fit for duty.

BASES FOR APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant has filed a list of seven separate "points" in a separate brief. In essence he raises three points contending that the evidence adduced at the hearing was not of the requisite quantum of substantial evidence necessary to sustain the charges and specifications, that his use of foul language towards the Third Mate was not wrongful in that it was the sole response of Appellant to an unprovoked assault upon him by the Third Mate, and that Appellant was prejudiced by the failure of the investigating officer to produce Third Mate McLean, as a witness.

APPEARANCE: Klein, Cohen & Schwartzenburg, New York, NY, by Howard Greenwald Esq.

OPINION

All the evidentiary points set forth by the Appellant and argued in his brief are to a great degree interrelated. The crux of the matter is seated in the credibility determination by the Administrative Law Judge. He weighed the various pieces of evidence and evaluated testimony of the witnesses both in favor of the Appellant and against the Appellant and made findings accordingly. The responsibility for demanding the credibility of witnesses and the weight, if any, to accord to the testimony of any witness is properly the responsibility of the Administrative Law Judge. Decisions on Appeal Nos. 2019, 2047, 2078. "His determination will be upheld absent the demonstration that he was arbitrary and capricious". Decision on Appeal No. 2097.

"Questions involving the credibility of the witness must be decided by the trier of facts and logically so, as it is only at this level the testimony of a witness may be elicited and his demeanor observed." Decision on Appeal No. 2017; affirmed, EM-49, 2 NTSB 2766. The Administrative Law Judge here has not relied on evidence intrinsically inconsistent or inherently unbelievable. The findings he has made with regard to all specifications of the charge of misconduct are supported by evidence of a reliable and probative character. I shall not disturb them.

In a second assignment of error Appellant raises the point that he was prejudiced by the failure of the Investigating Officer

to call Third Mate McLean as a witness. Appellant cannot now complain that he was unduly prejudiced by the Investigating Officer's failure to call the Third Mate, nor can he require that the inference be drawn that McLean would have testified adversely to the position of the Investigating Officer. The Investigating Officer did not choose to call McLean and counsel for Appellant declined to take advantage of the opportunity to have McLean testify. Appellant was given the full opportunity to call Mr. McLean and cannot now complain about the failure of the Investigating Officer to produce him. Decisions on Appeal Nos. 2068 and 1002.

The final distinct point raised by Appellant in his brief concerns the use of foul and abusive language by Appellant toward the Third Mate. The fifth specification reads "in that you, while serving as aforesaid, did, on or about 2 December 1978 while said vessel was in Cartagena, Colombia, wrongfully use foul and abusive language toward the Third Mate, Mr. McLean." Appellant's point is that his use of foul language was not wrongful under the circumstances or, said another way, that when the language was viewed in its context its use could not be made the basis for a specification of misconduct. "The policy behind the definition of the use of abusive language is grounded in the concept of insubordination. Whether insubordinate conduct has occurred in a situation is a matter of fact for the Administrative Law Judge to determine." Decision on Appeal No. 2042. The question of wrongfulness or whether or not an offense occurred was decided against Appellant by the Administrative Law Judge. The words "wrongful" are not essential for the specification to state an offense. Generally the charge of specification is stated in terms of the use of foul and abusive language towards a superior officer. The word "wrongful" adds nothing to the specification and its absence detracts not at all. The determination of whether the specification is proved in this case is solely within the province of the trier of fact, the Administrative Law Judge. His determination will not be disturbed on appeal.

CONCLUSION

The findings made by the Administrative Law Judge with regard to all five specifications of the charge of misconduct are supported by evidence of a reliable and probative character.

ORDER

The order of the Administrative Law Judge dated at New York, NY on 10 October 1979, is AFFIRMED.

R. H. SCARBOROUGH

Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 10th day of June 1981.